90-1799

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

NO.

DONALD PRUESSMAN, individually and
on behalf of others similarly situated,

Petitioners,
v.

PARKER LEE McDONALD; LEANDER J. SHAW, Jr.; ROSEMARY BARKETT; STEPHEN H. GRIMES; GERALD KOGAN; JOSEPH NESBITT; DANIEL PEARSON; THOMAS BARKDULL; HERBERT M. KLEIN; BERNARD JAFFE; THOMAS G. O'CONNELL; JOSEPH J. GERSTEN; RICHARD BRINKER; H. BERMAN; M. ERICE; DONNA CATTELL; AMALIA CONDE; RAFAEL MARTINEZ; JOHN PARSONS; DENNIS SHILLEN; LESLIE McCORMICK; JACKSON F. McCOY; EVELYN MERCHANT; JULIET MURPHY; F. LAURENS BROCK; STANFORD F. DERNIS; HENRY BURNETT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Can a United States District Court dismiss a suit for lack of jurisdiction over the subject matter when the complaint alleges violations of the United States Constitution during the course of a state court proceeding. in which the parties, factual allegations, issues, and claims are totally distinct?

Does 28 U.S.C. § 1257(a) - State Courts; certiorari - bar a suit brought in a United States District Court seeking injunctive and declaratory relief, and redress for violations of the United States Constitution during the course of a state court proceeding when there is no state court judgement involved, nor could there ever be because no state court proceeding exists involving the same parties, issues, and claims?

Can a United States District Court dismiss a complaint for lack of jurisdiction with prejudice"?

Where does this petitioner vindicate his constitutional rights?

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OCTOBER TERM 1990

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Petitioners,

v.

PARKER LEE McDONALD; LEANDER J. SHAW, Jr.; ROSEMARY BARKETT; STEPHEN H. GRIMES; GERALD KOGAN; JOSEPH NESBITT; DANIEL PEARSON; THOMAS BARKDULL; HERBERT M. KLEIN; BERNARD JAFFE; THOMAS G. O'CONNELL; JOSEPH J. GERSTEN; RICHARD BRINKER; H. BERMAN; M. ERICE; DONNA CATTELL; AMALIA CONDE; RAFAEL MARTINEZ; JOHN PARSONS; DENNIS SHILLEN; LESLIE McCORMICK; JACKSON F. McCOY; EVELYN MERCHANT; JULIET MURPHY; F. LAURENS BROCK; STANFORD F. DERNIS; HENRY BURNETT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Pro se petitioner, Donald Pruessman, respectfully prays that a writ of certiorari issue to review the judgment and of the Eleventh Circuit Court of Appeals entered in the above entitled proceeding on December 21, 1990, rehearing denied February 20, 1991.

OPINIONS BELOW

The judgement of the Eleventh Circuit Court of Appeals is reproduced in the Appendix hereto, page A-2. The district court's Final Order Granting Defendants' Motions to Dismiss is reproduced on page A-3.

JURISDICTION

This petition invokes the jurisdiction of this Court to review the judgement of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1).

UNITED STATES CONSTITUTIONAL PROVISIONS

The First, Fourth, and Fourteenth Amendments of the United States Constitution are reproduced in the appendix hereto, page A-10.

STATEMENT OF THE CASE

The complaint, filed as a class action in the United States District Court for the Southern District of Florida on August 8, 1989, invoked the federal question jurisdiction of that court pursuant to 28 U.S.C. § 1331 because it is a civil action arising under the Constitution and laws of the United States; under 28 U.S.C. § 1343 for violations of federal rights under color of state law pursuant to 42 U.S.C. § 1983; for a conspiracy to interfere with civil rights and cause a deprivation of equal protection of the laws pursuant to 42 U.S.C. § 1985; pursuant to 42 U.S.C. § 1986 for the failure to prevent wrongs mentioned in § 1985; and to secure equitable relief for the protection of civil rights. Attorney

fees were sought pursuant to 42 U.S.C. § 1988. Declaratory and injunctive relief against a continuation of violations of this petitioner's civil rights was sought pursuant to 28 U.S.C. §§ 2201, 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure. Included in the complaint are pendent state claims for invasion of privacy, defamation, and abuse of process. The complaint also requested that the action be maintained as a class action pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

The class proposed consists of all adult persons in the State of Florida who have received, or may receive, psychological, psychiatric, or substance abuse treatment and/or counseling, who during the course of litigation invoke Florida's psychotherapist-patient privilege.[1]

The complaint confronted the district court with important questions of law or fact common to the class. Among these the question of whether or not civil rights litigants, by bringing an action for unlawful detention under the Florida Mental Health Act,[2] forfeit the right of non-disclosure of irrelevant privileged communications.

The district court was also confronted with the question of whether or not the arbitrary failure or refusal to comply with the limitations and procedures of Florida's confidentiality and evidentiary statutes, among persons similarly situated, violates the Due Process Clause and

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[1] § 90.503, Fla. Statutes - Appendix, page A-11

[2] Florida Statutes, Chapter 394.

Equal Protection of the laws secured by the Fourteenth Amendment of the United States Constitution.

The thrust of the complaint is threefold, all related to violations of the United States Constitution during the course of a Florida state court proceeding for the alleged unlawful detention under color of the Florida Mental Health ("Baker") Act.

First, it sought injunctive relief to prevent irreparable constitutional injury.

Second, it seeks equitable relief against state judicial officers for arbitrary denials of fundamental constitutional rights, and because of their failure to follow or enforce mandatory requirements and procedures delineated in Florida Statutes and Rules of Civil Procedure.

Third, it seeks monetary damages from attorneys, and from state officials acting in concert with them, for acts depriving this petitioner of federal rights under color of state law.

The complaint challenges the constitutional infirmity of a trial court judge's non-specific order granting unbridled access to privileged matters protected by Florida law, whether relevant or irrelevant, unlimited in scope and time, and issued absent the procedures and hearings narrowly circumscribed by Florida Statutes and Rules of Civil Procedure.

It also alleges the failure of appellate judges to intercede and enforce the trial court judge's compliance with the mandatory statutory procedural requirements prior

to permitting intrusion into the area of privileged and private matters.

The complaint alleges the unlawful procurement and service of 28 subpoenas by defendant attorneys absent the procedures and hearings required by Florida law, and their unlawful issuance by court clerks in derogation of the non-discretionary procedures required by Florida law.

During the period of September 7 to November 3, 1989, all defendants upon whom service was effected filed Motions to Dismiss or answers. Said motions challenged the district court's jurisdiction over the subject matter and/or failure of this petitioner to state claims upon which relief could be granted.

The arguments presented within the various motions primarily consisted of judicial immunity, and the assertion that the district court was not empowered to entertain the complaint because only this Supreme Court can review state court decisions.

On November 8, 1989, prior to receiving this petitioner's responses to all Motions to Dismiss, the district court rendered it's "Final Order Granting Defendants' Motions to Dismiss".[3] The court justified it's dismissal on grounds that the complaint sought appellate review of a state court ruling which is not permitted by the *Rooker-Feldman Doctrine.* This petitioner responded with a

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[3] Appendix, page A-3

Motion to Vacate the Order of Dismissal on November 22, 1989 which was denied on December 13, 1989.[4]

On April 9, 1990, this petitioner submitted his initial brief to the Eleventh Circuit invoking that court's jurisdiction pursuant to 28 U.S.C. § 1291 providing for appeals from final decisions of district courts.

The respondents answered during the period of May 8 to May 30, 1990. This petitioner's reply brief was submitted on June 27, 1990.

On December 21, 1990, the Eleventh Circuit affirmed the district court's dismissal. This petitioner filed a suggestion for rehearing en banc on January 9, 1991 which was denied on February 20, 1991. The judgment was entered as a mandate on March 1, 1991.

SUMMARY OF THE ARGUMENT

The argument demonstrates that this petitioner is well justified in seeking to invoke the supervisory power of this Court because of the failure of a district court to exercise jurisdiction properly conferred upon it, and for it's improper dismissal of a suit for lack of jurisdiction "with prejudice".

It reveals that the rationale of the district court, and authorities relied upon, cannot possibly justify a dismissal of a complaint that alleges causes of action arising under the Constitution and laws of the United States. It also reveals radical departures from the accepted and usual course of

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[4] Appendix, page A-5

proceedings, which by their very nature, conflict with decisions of this Court, those of the Eleventh Circuit, and those of other courts of appeals.

The argument also evinces that by rendering a "silent" opinion sanctioning an obviously specious dismissal by the district court, the Eleventh Circuit failed to apply their mandatory standard of review prior to affirming the dismissal. In so doing, the court below also departed from the accepted and usual course of proceedings which by it's nature, conflicts with binding precedent of this Court, it's own decisions, and those of other courts of appeals.

While the questions before this Court are jurisdictional, the argument necessarily shows that the complaint states causes of action arising under the Constitution which the district court was compelled to entertain.

Finally, the argument unveils a strong possibility that the complaint was dismissed based on the nature of the defendants, not on federal law.[5]

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[5] Respondents Honorables McDonald, Shaw, Barkett, Grimes, and Kogan are Justices of the Florida Supreme Court; Honorables Nesbitt, Pearson, and Barkdull were/are Judges of Florida's Third District Court of Appeals; Honorables Klein, Jaffe, and O'Connell are Judges of the Eleventh Judicial Circuit, Dade County, Florida; respondent Brinker was Clerk of the Court for Dade County, Florida; respondents Berman, Erice, Cattell, Conde, and Martinez were/are deputy clerks of the court for Dade County, Florida; respondents Parsons, Shillen, McCormick, McCoy, Merchant, Murphy, Brock, Dernis, and Burnett are attorneys and members of the Florida Bar.

ARGUMENT

THE ROOKER-FELDMAN DOCTRINE CANNOT JUSTIFY DISMISSAL OF THE COMPLAINT

Apparently looking for a way not to deal with a controversial suit, the district court improperly applied the Rooker-Feldman Doctrine to justify it's specious dismissal of the complaint. In it's order of dismissal, the district court declared that this petitioner had wrongfully invoked the court's jurisdiction to entertain what is essentially a request for an appellate review of a state court ruling.[6]

It is crystal clear that the *Rooker-Feldman Doctrine* only proclaims that United States District Courts have no authority to review "final" judgments of state courts as provided for by 28 U.S.C. § 1257(a).[7] Consequently, said doctrine cannot justify dismissal of this petitioner's suit because the district court was not confronted with any state court judgment, nor could it ever because there is no state court proceeding, nor has there ever been one, involving any of the parties, issues, or claims stated in the complaint.

The only decisions implicated in the complaint are those of the defendants to do that which is prohibited by

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[6] In it's order granting the defendants' motions to dismiss, the district court relied on *Rooker v. Fidelity Trust Co.*, 263 U.S. 462 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)

[7] In pertinent part, 28 U.S.C. § 1257 states: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court."

the Federal Constitution. Consequently, this petitioner sought refuge in the district court which supposedly is the guardian of federal rights, and supposedely protects citizens from unconstitutional action under color of state law, whether it be executive, legislative, or judicial.[8]

Because the complaint sought injunctive relief to prevent further irreparable constitutional injury, and given the broad sweep of 42 U.S.C. § 1983, the district court failed in it's obligation to this petitioner.[9]

THE DISTRICT COURT DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF PROCEEDINGS

Given the undisputable fact that the *Rooker-Feldman Doctrine* does not, and cannot, justify dismissal of the complaint, the only alternatives available to the district court were to adjudicate the case on the merits, or dismiss the complaint as either frivolous or on the grounds that it failed to state a claim upon which relief could be granted.

In their motions to dismiss, the defendants challenged the court's jurisdiction over the subject matter as well as the existence of cognizable causes of action. Therefore, the course of action the district course should have followed was to have found that jurisdiction existed and dealt with the

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[8] *Micthcum v. Foster*, 407 U.S. 242, 245 (1971) citing *Ex Parte Virginia*, 100 U.S. 339 (1880)

[9] *Hardin v. Straub*, 109 S.Ct. 1998, 2001 n. 5 (1989)

defendants' objections as a direct attack on the merits of this petitioner's case.[10]

The district court should also have given this petitioner an opportunity for discovery and for a hearing that is appropriate to the nature of the motions to dismiss. Instead, on September 22, 1989, the court granted a motion for protective order from respondents Honorables McDonald, Shaw, Barkett, Grimes, and Kogan, and gratuitously extended that protection to all defendants pending resolution of the motions to dismiss. Consequently, this petitioner was denied responses to discovery already propounded to defendants.[11]

Assuming this Court will exert it's supervisory power instructing the district court to exercise it's rightful jurisdiction, that court can opt to dismiss the complaint as frivolous or for failure state a cognizable cause of action. However, it must conclude beyond doubt that this petitioner can prove no set of facts in support of his claims which would entitle him to relief,[12] and the causes of action alleged are so patently without merit so as to justify dismissal for want of jurisdiction.[13]

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[10] *Lawrence v. Dunbar*, 919 F.2d 1525 (1990) citing *Williamson v. Tucker*, 645 F.2d 404, 414-416 (5th Cir. 1981)

[11] *Williamson, supra*, 645 F.2d at 414.

[12] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)

[13] *McGinnis v. Ingram Equipment Co.*, 918 F.2d 1491, 1494 (11th Cir. 1990)

It is interesting to note that the district court's order dismissing the action for lack of jurisdiction was "with prejudice". This would appear to constitute a radical departure from the accepted course of judicial proceedings and a conflict with the edicts of this Court stated in *Costello v. United States.*[14]

THE ELEVENTH CIRCUIT SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF PROCEEDINGS

On appeal, this petitioner argued that the *Rooker-Feldman Doctrine* could not possibly justify dismissal of the complaint because no state court judgment was involved, and because no party in the state court action referred to in the complaint is a party in this petitioner's federal action, nor is there one identical factual allegation, nor are the issues and claims the same.

This petitioner argued that the complaint could not possibly be construed as an attempt to appeal any Florida state court decision as suggested by the district court. Instead, the federal claims alleged in the complaint were for violations of this petitioner's federally guaranteed civil rights arising out of the unconstitutional and abusive conduct of the defendants.

Given the undisputable fact that the district court improperly dismissed the complaint, the court below was obligated to exercise it's established standard of review prior

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[14] 365 U.S. 265, 285-86 (1961)

to affirming a dismissal of a district court. That standard is to accept the material allegations of the complaint as true, and liberally construe the complaint in favor of the plaintiff.[15] In the Eleventh Circuit's own words:

> This standard of review mandates that we reverse the dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[16]

Incredibly, on December 21, 1990, some eight months after submission of this petitioner's initial brief, the court below affirmed the district court's dismissal providing only the following profound statement as justification:

> ". . . for the reasons stated in the Final Order Granting Defendants' Motion to Dismiss . . . "

In so doing, the court below not only sanctioned the specious dismissal of the district court, but also it's radical departure from the usual and acceptable course of judicial proceedings. Needless to say, it also departed from it's own usual course of judicial proceedings.

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[15] *Burch v. Apalachee Community Health Service*, 840 F.2d 797, 798 (11th Cir. 1988) citing *Walker Process Equipment v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

[16] *Burch*, 840 F.2d at 798 citing *Conley v. Gibson*, 355 U.S. at 45-46. This standard of review is universal throughout the Federal Circuits.

In response, this petitioner filed a suggestion for rehearing proposing three issues to merit *en banc* consideration.

The first issue concerned the apparent contradiction of the complaint with the court's mandatory standard of review. This petitioner pointed out that federal courts have a "virtually unflagging obligation" to exercise jurisdiction,[17] and cited additional authority indicating that in order to dismiss a complaint for want of jurisdiction, the rights claimed must be so insubstantial, implausible, foreclosed by prior decisions of this Supreme Court, or otherwise completely devoid of merit as not to invoke a federal controversy.[18]

The second issue concerned the necessity for the court to maintain uniformity of it's decision in *Burch v. Apalachee Community Health, Inc.*[19], and to conform with the holding of this Court in *Zinermon v. Burch.*[20]

Given the nature of the wrongs complained of, in discussing this second issue, this petitioner posed the question as to whether the state judiciary is exempt from

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[17] *New Orleans Public Service, Inc. v. Council of New Orleans*, 109 S.Ct. 2506, 2513 (1989)

[18] *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 70, 71 citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974)

[19] 840 F.2d 797 (11th Cir. 1988)

[20] 110 S.Ct. 975 (1990)

compliance with due process of law required by the Constitution, and indicated that the answer must be considered in light of the provisions of the First and Fourteenth Amendments.

This petitioner asserted that the right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances,[21] and that when petitiioning the courts, this constitutionally protected right is circumscribed by rules and procedures. Consequently, the failure to adjudicate claims within the boundaries of said rules and procedures abridges a citizen's First Amendment right secured by the United States Constitution.

As to the Fourteenth Amendment, this petitioner pointed out that the Due Process Clause guarantees fair procedure and militates against the deprivation of a constitutional interest without due process of law,[22] and indicated that the Clause applies to the judicial, legislative, and executive branches of state government.

The suggestion for rehearing apprised the court below that in *Zinermon*, this Court elaborated on three types of § 1983 claims that may be brought against the state under the Due Process Clause.[23]

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[21] *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)

[22] *Zinermon, supra*, 110 S.Ct. at 983.

[23] *Id*, 110 S.Ct. at 983

The first embraces specific protections defined in the Bill of Rights that are incorporated in the Due Process Clause. Accordingly, this petitioner pointed out that:

> The complaint alleges violations of fundamental rights secured by the First and Fourth Amendments of the United States Constitution.

The second embraces a substantial component contained in the Due Process Clause that bars certain arbitrary wrongful government actions regardless of fairness of procedures used to implement them. Accordingly, this petitioner pointed out that:

> The complaint alleges arbitrary denials of fundamental rights that were wrongful because of the affirmative duty of the defendants to uphold constitutional guarantees, or their failure to follow statutory procedures and rules of civil procedure.

The third concerns the emphasis by this Court that procedural due process rules are meant to protect persons against mistaken or unjustified deprivations of life, liberty, or property.[24] In *Carey*, this Court explained that a deprivation of procedural due process is actionable under § 1983 without regard to whether the same deprivation would have taken place even in the presence of proper procedural safeguards.[25] In essence, this Court holds that

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[24] *Id*, 110 S.Ct. at 983 citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)

[25] *Id*, 110 S.Ct. at 983, note 11.

the right to procedural due process is "absolute" and cannot be denied. Accordingly, this petitioner pointed out that:

> The complaint alleges the unlawful procurement and service of 28 subpoenas by defendant attorneys absent required hearings and procedures required by Florida Statutes and Rules of Civil Procedure, and the unlawful issuance of said subpoenas by defendant clerks with total disregard of the mandatory procedural requirements delineated in the Florida Rules of Civil Procedure.
>
> It also alleges the failure of state judges to comply with statutory requirements and rules of procedure prior to granting access to privileged information protected by Florida statutes.

The complaint does not allege a scenario of necessity for quick action by the state that may excuse the conduct of state officials, or the impracticability of providing any predeprivation hearings. However, it does present an antithetical scenario where pre-deprivation hearings and procedures were not only practical, but mandatory under Florida law. The allegations of the complaint make it quite clear that state officials and actors not only could, but were required to provide a meaningful hearing before the deprivation of this petitioner's constitutional rights occurred.

The third issue was directed to the collective conscience of the court because it intermingled moral implications with jurisdictional questions. Basically it raised the question of whether or not the district court judge may have been influenced by misleading argument.

In the discussion of this third issue, this petitioner addressed frivolous assertions of the doctrine of res judicata. The declaration or implication of this doctrine by certain defendants was frivolous because as lawyers, they should know that res judicata only applies to situations where there is a prior judgment on the merits, between the same parties, on a particular issue or points controverted. Also Frivolous because they also knew that no common elements exist between the state court proceeding and the federal complaint subject of this petition, and that neither the parties nor the acts giving rise to the complaint are remotely similar.

It is an accepted fact that federal courts apply the law of the state in which they sit with respect to the doctrine of res judicata.[26] Under Florida law, without and actual determination on the merits, evidenced by a record that cannot be controverted, the doctrine of res judicata does not apply.[27] Further, in order to support a contention of res judicata, the complete records of any suits upon which a defendant relies should be produced.[28] This the defendants did not do.

The question posed by this petitioner was whether misleading and deceptive argument caused the erroneous

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[26] *N.A.A.C.P. v. Hunt*, 891 F.2d 1955 (11th Cir. 1990)

[27] *Lake v. Hancock*, 20 So. 811, 814 (Fla. 1986)

[28] *Fulton v. Gesterding*, 36 So. 56 (Fla. 1904)

perception of the district court judge whose sole function was to determine:

> ". .whether the action complained of. .violates fundamental conceptions of justice which lie at the base of our civil and political insitutions, and which define the community's sense of fair play and decency." [29]

The alleged conduct of the defendants during the course of a state court proceeding violated all of the above.

In a continuing disregard of this petitioner's federal rights, the Eleventh Circuit chose to ignore these issues.

ENTITLEMENT TO REDRESS FOR DEPRIVATION OF FUNDAMENTAL RIGHTS

Our society is premised on the expectation that citizens will respect laws enacted by a representative legislature. In turn, citizens have the right to expect the courts to enforce those laws.

It is an indisputable rule that where there is a legal right, there is also a legal remedy whenever that right is invaded. The very essence of civil liberty consists in the right of every individual to claim the protection of the laws when he receives an injury. The government of this country has been emphatically termed a government of laws, and not of men, but will cease to deserve this high appellation

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[29] *Dowling v. United States*, 110 S.Ct. 668, 674 (1990) citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Rochin v. California*, 342 U.S. 165, 173 (1952)

if the laws furnish no remedy for the violation of a vested legal right.

The judicial power of the United States extends to all cases arising under the Constitution, and the framers of that document intended it as a rule for the government of courts. That document, directs judges to take an oath to support it, and applies to judges in a special manner to their conduct in their official capacity. They can refuse justice to no one.

In dismissing the complaint, the courts below defeated the above paraphrased propositions extracted from *Marbury v. Madison,*[30] This petitioner would like to believe those propositions are equally applicable today as they were in 1803.

Before seeking refuge in a United States District Court, this petitioner evaluated the conduct of the defendants and rights secured by the Constitution, and was unable to reconcile the two. Simply stated, where due process is concerned, judges are not free to disregard the limits that bind them in their judicial capacity.[31]

This Court has declared that one aspect of liberty protected by the Fourteenth Amendment is a right of

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[30] 5 U.S. (1 Cranch) 137 (1803)

[31] *Dowling, supra,* 110 S.Ct. at 674, citing *Rochin v. California,* 342 U.S. 165, 170 (1952)

personal privacy, or a guarantee of certain zones of privacy.[32] That right extends to psychotherapist-patient communications and falls within a zone protected as a fundamental constitutional right.[33] There is a substantial right of privacy that extends to psychoterapist-patient communications in a patient initiated state court civil suit.[34]

Under the Florida Constitution, privacy is a "fundamental" right. By general election in 1980, Florida voters amended the State Constitution making privacy a right stronger and broader in scope than the Federal Constitution.[35] Since it is an interest recognized and protected by the Constitution and laws of Florida, it is a "liberty" interest as meant in the Due Process Clause of the United States Constitution, and the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.[36]

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[32] *Carey v. Population Service International*, 431 U.S. 678 (1977)

[33] *Caesar v. Mountanos*, 542 F.2d 1064, 1067 n. 9, 1072 (9th Cir. 1976)

[34] *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989); *See also Yoho v. Lindsley*, 248 So.2d 187 (Fla. 4th DCA 1971)

[35] *In Re T.W., A minor*, 551 So.2d 1186, 1191 (Fla. 1989)

[36] *Paul v. Davis*, 424 U.S. 693, 710-11 (1976); *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037 (11th Cir. 1989)

Fundamental rights "are protected not only against heavy-handed frontal attacks, but also from being stifled by more subtle governmental interferences." [37] A requirement imposed by the state that significantly interferes with the exercise of a fundamental right must be supported by sufficiently important states interests and closely tailored to effectuate only those interests, and evidentiary rules must meet such standards if they significantly burden a fundamental liberty interest.[38]

In harmony with the above propositions, Florida's legislative and judicial branches have enacted statutes and adopted rules that prescribe the manner and scope of permissible intrusion into the constitutionally protected zone of privacy,[39] none of which permit unbridled access. It is impossible to hold that unlawful and wilful disregard for the prescribed methodology for intrusion into a protected zone of privacy does not state a cause of action arising under the Constitution of the United States.

While the identity of the defendants undoubtedly makes this petitioner's federal action a controversial one, and a possible blow to the ego of the State, the fact that they are judicial officers, state officials, and officers of the

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[37] *Cruzan v. Director, Missouri Department of Health*, 110 S.Ct. 2841, 2864 (1990)

[38] *Id.*, 110 S.Ct. at 2864-65

[39] Fla. Statutes: § 90.503; § 396.112; § 397.053; 394.459 - Fla. Rules Civ. Procedure 1.280; 1.350; 1.351; 1.360. *See Index to Appendix*, page A-1.

court allegedly acting in concert with them, does not immunize them from the operation of the Fourteenth Amendment. State action refers to exertion of state power in all forms,[40] and when the effect of that action denies rights subject to the Fourteenth Amendment, recourse to a United States District Court is appropriate.

A JURISDICTIONAL DILEMMA

In it's order granting defendants' motions to dismiss, the district court stated the following:

> In essence, the plaintiff seeks review of a state court order, issued in a state court action.
>
> Rather than attempting to gain a final review of the state court order by filing a writ of certiorari with the United States Supreme Court, the plaintiff has attempted to invoke this court's original jurisdiction (pursuant to 28 U.S.C. § 1331, 1343) based on the allegation that several of his civil rights as guaranteed by the U.S. Constitution have been violated.

It is difficult for this pro se petitioner to accept the fact that the courts below are unaware of the patently obvious fact that only final judgments of state courts are reviewable by this Court. This petitioner can find no jurisdictional statute that would accommodate the specious rationale of the district court, or allow this petitioner to have done what the district court suggests.

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[40] *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948)

It is also difficult for this pro se petitioner to accept the fact that the courts below could close their eyes to the fact that no state court judgment or proceeding exists involving any of the parties, issues, or claims contained in the complaint, and that no such state court judgment could ever come to fruition.

Since the complaint sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Article III, § 2, and so within the power of Congress to assign to the jurisdiction of district courts. That power was exercised by Congress when it enacted 28 U.S.C. § 1343. Because the main thrust of this petitioner's complaint is state infringement on his rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment, this petitioner calls to the attention of the Court that in 28 U.S.C. § 1343(3), Congress declared:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person * * * [t]o redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States.[41]

Having been properly petitioned, the district court lacked the authority to abstain from exercising the jurisdiction conferred upon it.[42]

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[41] *Baker v. Carr*, 369 U.S. 186, 200 (1962)

[42] *New Orleans Public Service Inc. v. Council of New Orleans*, 109 S.Ct. 2506, 2512-13 (1989).

The dismissal has also defeated judicial economy in light of the fact there has been no adjudication on the merits, and unless this Court enlightens this petitioner where to vindicate his constitutional rights, the only avenue known is to file another suit in federal court with the hope that constitutional guaranties will be upheld.

CONCLUSION

In sanctioning the specious dismissal of the district court, the Eleventh Circuit has told this petitioner, and those similarly situated, that United States District Courts are not open to redress for violations of federal rights, and that whatever constitutional injury and damage that happens in a state court must be tolerated and accepted. This attitude is totally incompatible with the Constitution and laws of the United States.

Justice dictates that the dismissal of the district court be reversed, and this petitioner allowed to vindicate his constitutional rights in a United States District Court.

This Court should grant the writ in order to preserve judicial sanctity and uniformity throughout the federal circuit.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5020
Non-Argument Calendar

D.C. Docket No. 89-1613-Civ-JLK

DO NOT
PUBLISH

DONALD PRUESSMAN, individually
and on behalf of all others
similarly situtated,

Plaintiff-Appellant,

versus

HON. PARKER LEE McDONALD,
ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Florida

(December 21, 1990)

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

PER CURIAM

The judgment is affirmed for the reasons stated in the Final Order Granting Defendants' Motion to Dismiss entered by Chief Judge James Lawrence King under date of November 8, 1989.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-1613-CIV-KING

DONALD PRUESSMAN, individually,
and on behalf of all others
similarly situated,

Plaintiffs,

v.

HONORABLE PARKER LEE McDONALD,
et. al.,

Defendants

FINAL ORDER GRANTING
DEFENDANTS' MOTIONS TO DISMISS

Before this court are the defendants' motions to dismiss the plaintiffs' complaint. The plaintiff's response was due September 26, 1989. He has requested and was granted an additional fourteen (14) days to respond. The plaintiff's response was received and was thoroughly examined. In essence, the plaintiff seeks review of a state court order, issued in a state court action, authorizing discovery of plaintiffs' past and current medical and/or psychological history. Before the entry of this discovery order, the plaintiff petitioned the State Appellate Court and Supreme Court in an attempt to gain reversal of the state trial court's order. The State Appellate Court and Supreme Court denied the plaintiffs' petition. Rather than attempting to gain a final review of the state court order by filing a writ of certiorari with the United States Supreme Court, the plaintiff has attempted to invoke this court's original

jurisdiction (pursuant to 28 U.S.C. §§ 1331, 1343) based on the allegation that several of his civil rights, as guaranteed by the U.S. Constitution, have been violated. In addition to his civil rights claims, the plaintiff seeks review of various state claims based on the doctrine of pendant jurisdiction.

The plaintiff has wrongfully invoked this court's original jurisdiction to entertain what is essentially a request for an appellate review of the above described state court ruling. Therefore, the complaint in its entirety is dismissed, pursuant to Fed. R. Civ. P. 12(b)(1), for lack of jurisdiction over the subject matter. It is well settled law that a plaintiff may not seek review of a state court ruling simply by alleging a civil rights violation in his complaint. Even when there is constitutional error in the state court's decision, the plaintiffs' sole recourse is to the United States Supreme Court not to the United States District Court. See Haggerty v. Succession of Clement, 749 F.2d 217 (5th Cir. 1984); Reynolds v. State of GA, 640 F.2d 702 (5th Cir. 1981); Dist. of Columbia Court of Appeals v. Feldman, 103 S.Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 44 S.Ct. 149 (1923).

The doctrine of pendant jurisdiction may only be invoked in order to bring within the jurisdiction of a federal court the state law claims a plaintiff may have against a defendant who is already properly in federal court, (see United Mine Workers v. Gibbs, 383 U.S. 715 (1966)). Therefore, the plaintiff may not rely on this doctrine to maintain his state court claims in this court. Accordingly, after a careful review of the record, considering the applicable law and the court being otherwise fully advised, it is:

ORDERED AND ADJUDGED that all of the defendants' motions to dismiss are hereby GRANTED. It is

FURTHER ORDERED AND ADJUDGED that the plaintiffs' complaint in its entirety, including any pendant state claims, is DISMISSED with prejudice.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 8th day of November 1989.

(signature)
James Lawrence King
Chief U.S. District Judge
United States District Court
Southern District of Florida

DONALD PRUESSMAN, individually,
and on behalf of all others
similarly situated,

Plaintiffs,

v.

Honorable PARKER LEE McDONALD,
Et. al.,

Defendants.

MOTION TO VACATE FINAL ORDER OF DISMISSAL

Plaintiff, DONALD PRUESSMAN, and the class represented, hereby move the Court to vacate it's final order of dismissal rendered on November 8, 1989 and for grounds state as follows:

1. This Court must vacate it's order of dismissal which is based on inapplicable law and a total misconception of the facts in the complaint. The allegations indisputably show that there is no attempt by this plaintiff to obtain appellate review of a final judgment.

2. The cases relied on upon [by] this Court to support it's Order of Dismissal are all inappropriate. Each one concerns a "FINAL" judgment of a state court where the only recourse was to seek review in the United States Supreme Court pursuant to 28 U.S.C. § 1257. Hagerty v. Succession of Clement, 749 F.2d 217 (5th Cir. 1984); Reynolds v. State

of Ga., 640 F.2d 702 (5th Cir. 1981); District of Columbia Court of Appeals v. Feldman, 103 S.Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 44 S.Ct. (1923).

3. Conversely, as this motion is being read, the state court proceeding "referred" to in the complaint continues on it's journey to finality. If an appeal should prove necessary, it's rightful path will be via the state appellate system and ultimate possible review by the United States Supreme Court.

4. Contrary to the thrust of this Court's order of dismissal, this plaintiff relies on federal question jurisdiction of the Court pursuant to 28 U.S.C. § 1331. The complaint alleges constitutional violations and conduct in the state court which fails to meet even the minimum levels of constitutionally accepted standards. The complaint alleges a course of conduct in which the defendants have ignored or refused to apply existing statutes, rules of civil procedure, and binding case law. The rule stated in Feldman concerning the existence of federal question jurisdiction over general challenges to constitutional violations is admirably stated by Justice Stevens in his dissent:

> If a challenge to a state court's decision is brought in United States District Court and alleges violations of the United States Constitution, then by definition it does not seek appellate review. It is plainly within the federal-question jurisdiction of the federal court. 28 U.S.C. § 1331. District of Columbia v. Feldman, 460 u.s. AT 490, 103 S.Ct. at 1318.

5. Pursuant to 28 U.S.C. § 1343, this Court has an obligation to exercise it's jurisdiction over this action. Failure

to do so wrongfully ignores the very purpose of § 1983 which interposes the federal courts between the States and the people as guardians of federal rights, and to protect the people from unconstitutional action under color of state law:

> ". . . whether that action be executive, legislative, or judicial." Mitchum v. Foster, 407 U.S. at 240-242, 92 S.Ct. at 2161-62, 32 L.Ed.2d 705 (1972) citing Ex Parte Virginia, 100 U.S. at 346, 25 L.Ed. 676.

6. Further, this Court's order of dismissal wrongfully ignores the power and obligation vested the Court by Congress under 42 U.S.C. § 1983 which expressly authorizes a suit in equity and federal injunctive relief against a state court proceeding. This Court has been asked to issue injunctive relief to prevent great, immediate, and irreparable loss of this plaintiff's federally guaranteed constitutional rights. Mitchum, supra, at U.S. 242.

7. In essence, the final order of dismissal rendered by this Court impermissibly holds that:

> This plaintiff is not entitled to redress for irreparable injury resulting from deprivations and violations of federally guaranteed constitutional rights; and
>
> This plaintiff is not entitled to equitable relief to prevent further and continued irreparable injury resulting from deprivations and violations of federally guaranteed constitutional rights.

8. The "absolutes" pertaining to this plaintiff's action which this Court appears to have ignored, and which militate against dismissal are:

There are constitutional deprivations and violations which have resulted in irreparable injury alleged in the complaint which are actionable under 42 U.S.C. §§ 1983, 1985(2), 1985(3), and 1986;

Unless the equitable relief sought pursuant to 42 U.S.C. § 1983 is granted, this plaintiff will be subjected to further irreparable injury resulting from continuing deprivations and violations of his constitutional rights.

There are no "de novo" state court claims presented to the Court;

No party in the state court proceeding referred to in the complaint is a party to this action;

No party in the state court proceeding is alleged to have committed the wrongs complained of in this action;

Until proven otherwise, the allegations of the complaint must be taken as true.

WHEREFORE, this plaintiff, and the class represented, requests the Court to vacate it's order of dismissal dated November 8, 1989.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to all parties on the attached mailing list this 22nd day of November, 1989.

(signature)
DONALD PRUESSMAN-Plaintiff, Pro Se
Plaintiff - Pro Se
Camillus House, 726 N.E. 1st Ave.
P.O. Box 1829 - Miami, FL 33101
(305) 598-2778

UNITED STATES
CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 90.503, FLORIDA STATUTES
PSYCHOTHERAPIST-PATIENT PRIVILEGE

(1) For purposes of this section:

(a) A "psychotherapist" is:

1. A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; or

2. A person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

(b) A "patient" is a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

(c) A communication between psychotherapist and patient is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the patient in the consultation, examination, or interview.

2. Those persons necessary for the transmission of the communications.

3. Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist.

(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of his mental or emotional condition, including alcoholism and other drug addiction, between himself and his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

(3) The privilege may be claimed by:

(a) The patient or his attorney on his behalf.

(b) A guardian or conservator of the patient.

(c) The personal representative of a deceased patient.

(d) The psychotherapist, but only on behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.

(4) There is no privilege under this section:

(a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.

(b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.

(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.[1]

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[1] Sponsors' Notes - 1979 - § 90.503(4)(c). The last exception to the privilege arises when a patient, as a litigant, puts his mental condition in issue. Existing Florida Statute § 90.242(3)(b) and § 490.32(2)(b) contain similar provisions. When one party makes a claim or defense regarding his mental or emotional condition, it would be inimical to the interest of justice to deny the other party an opportunity to show otherwise. This possible inequity is remedied in the Florida Rules of Crim.Pro. 3210 and Fla.Rule Civ.Pro 1.360 by allowing the state and adverse parties, respectively, to obtain a court order for mental examination of the patient-litigant. The language of this exception insures that the non-privileged communications are those that are relevant to the issue of mental condition rather than ultimate guilt or innocence. The exception is equally applicable in civil and criminal proceedings.

Similar exceptions are contained in Prop.Fed.Rule Evid. 504 [not enacted]; Calif.Evid.Code §§ 1016, 1017, 1024; New Jersey Evid.Rule 28 and Kansas Code of Civ.Pro. § 60-247.

§ 396.112, FLORIDA STATUTES
RECORDS OF ALCOHOLICS AND INTOXICATED PERSONS

The records of a treatment resource pertaining to the identity, diagnosis, prognosis, or treatment of any person are confidential and are exempt from the provisions of s. 119.07(1). Such records shall not be disclosed without the written consent of the person to whom they pertain, but appropriate disclosure may be made without such consent:

(4) Upon court order for purposes unrelated to treatment after application showing good cause therefor. In determining whether there is good cause for disclosure, the court shall weigh the need for the information to be disclosed against the possible harm of disclosure to the person to whom such information pertains. Such disclosure, however, shall be subject to any privilege provided by law.

§ 397.053, FLORIDA STATUTES
RECORDS OF DRUG ABUSERS

The records of a treatment resource pertaining to the identity, diagnosis, prognosis, or treatment of any person are confidential and are exempt from the provisions of s. 119.07(1). Such records shall not be disclosed without the written consent of the person to whom they pertain, but appropriate disclosure may be made without such consent:

(4) Upon court order for purposes unrelated to treatment after application showing good cause therefor. In determining whether there is good cause for disclosure, the court shall weigh the need for the information to be disclosed against the possible harm of disclosure to the

person to whom such information pertains. Such disclosure, however, shall be subject to any privilege provided by law.

§ 394.459, FLORIDA STATUTES
RIGHTS OF PATIENTS

(9) Clinical record; confidentiality. - A clinical record for each patient shall be maintained. The record shall include data pertaining to admission and such other information as may be required under rules of the department. A clinical record is confidential and exempt from the provisions of s. 119.07(1). Unless waived by express and informed consent by the patient or his guardian or, if the patient is deceased, by the patient's personal representative or by that family member who stands next in line of intestate succession, the confidential status of the clinical record shall not be lost by either authorized or unauthorized disclosure to any person, organization, or agency. No part of the clinical record shall be released, except:

(b) The record shall be released to persons authorized by order of court, excluding matters privileged by other provisions of law. In determining whether there is good cause for disclosure, the court shall weigh the need for the information to be disclosed against the possible harm of disclosure to the person to whom such information pertains.

RULE 1.280
GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter

upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in Rule 1.200 and Rule 1.340.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

RULE 1.350
PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Request; Scope. Any party may request any other party (1) to produce and permit the party making the request, or someone acting in his behalf, to inspect and copy any designated documents, including writings, drawings, graphs, charts, photographs, phone-records and other data compilations from which information can be

obtained, translated, if necessary, by the party to whom the request is directed through detection devices into reasonably usable form, that constitute or contain matters within the scope of Rule 1.280(b) and that are in the possession, custody or control of the party to whom the request is directed; or (2) to inspect and copy, test or sample any tangible things that constitute or contain matters within the scope of Rule 1.80(b) and that are in the possession, custody or control of the party to whom the request is directed; or (3) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation on it within the scope of Rule 1.280(b).

RULE 1.351
PRODUCTION OF DOCUMENTS
AND THINGS WITHOUT DEPOSITION

(a) Request; Scope. A party may seek inspection and copying of any documents or things within the scope of Rule 1.350(a) from a person who is not a party by issuance of a subpoena directing the production of the documents or things when the requesting party does not seek to depose the custodian or other person in possession of the documents or things.

(b) Procedure. A party desiring production under this rule shall give notice to every other party of the intent to serve a subpoena under this rule at least ten days before the subpoena is issued. The proposed subpoena shall be attached to the notice and shall state the time, place and method for production of the documents or things, the name

and address of the person who is to produce the documents or things, if known, and if not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, shall include a designation of the items to be produced, shall state that the person who will be asked to produce the documents or things has the right to object to the production under this rule and that the person will not be required to surrender the documents or things. If any party serves an objection to production under this rule within 10 days of service of the notice or the person upon whom the subpoena is to be served objects at any time before the production of the documents or things, the documents or things shall not be produced under this rule.

(c) Subpoena. If no objection is made by a party under subdivision (b), the clerk shall issue a subpoena for the production of the documents or things in accordance with the notice and deliver it to the party serving the notice. The subpoena shall require production of the documents or things specified in it. The subpoena may give the recipient an option to deliver or mail legible copies of the documents or things to the party serving the subpoena. The person upon whom the subpoena is served may condition the preparation of copies on the payment in advance of the reasonable costs of preparing the copies. The subpoena shall require production only in the county of the residence of the custodian or other person in possession of the documents or things or in the county where the documents or things are located or where the custodian or person in possession usually conducts his business.

RULE 1.360
EXAMINATION OF PERSONS

(a) Request: Scope.

(1) A party may request any other party to submit to, or to produce a person in his custody or legal control for, examination by a qualified expert when the condition that is the subject of the requested examination is in controversy.

(A) When the physical condition of a party or other person under subdivision (1) is in controversy, the request may be served on the plaintiff without leave of court after commencement of the action, and on any other person with or after service of the process and initial pleading on that party. The request shall specify a reasonable time, place, manner, conditions and scope of the examination and the person or persons by whom the examination is to be made. The party to whom the request is directed shall serve a response within 30 days after service of the request, except that a defendant need not serve a response until 45 days after service of the process and initial pleading on that defendant. The court may allow a shorter or longer time. The response shall state that the examination will be permitted as requested unless the request is objected to, in which event the reasons for the objection shall be stated.

(B) In cases where the condition in controversy is not physical, including domestic relations and bastardy cases when the blood group is in issue, a party may move for an examination by a qualified expert as in subdivision (1). The order for examination shall be made only after notice to the person to be examined and to all parties, and shall specify the time, place, manner, conditions and scope of the

amination and the person or persons by whom it is to be made.

(2) An examination under this rule is authorized only when the party submitting the request has good cause for the examination. At any hearing the party submitting the request shall have the burden of showing good cause.

(3) Upon request of either the party requesting the examination or the party or person to be examined, the court may establish protective rules governing such examination.